

40 KAR 2:240. Hearings for denial of application for more than two (2) going-out-of-business sales during a four (4) year period.

RELATES TO: KRS 365.447

STATUTORY AUTHORITY: KRS 15.180, 365.447, 367.150(4)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 365.447 requires in pertinent part the Attorney General, Division of Consumer Protection to promulgate rules and administrative regulations pertaining to applications by any party for a permit to conduct a going-out-of-business sale subsequent to two (2) previous going-out-of-business sales within a four (4) year period. This administrative regulation sets forth hearing and conference procedures for the appeal by the applicant of a denial of a subsequent permit by the Attorney General, pursuant to KRS 365.447.

Section 1. Purpose and Construction. When the Attorney General through the Division of Consumer Protection has determined and given notice that a request for approval of a permit to conduct a going-out-of-business sale subsequent to two (2) previous going-out-of-business sales in a four (4) year period has been denied in accordance with KRS 365.447, any applicant so affected is entitled to due process. Accordingly, this administrative regulation is to be liberally constructed so as to aid in that process.

Section 2. A party may:

- (1) Represent himself; or
- (2) Be represented by:
 - (a) An authorized representative; or
 - (b) Counsel.

Section 3. Hearing Officer. A hearing officer shall be appointed and serve pursuant to KRS 13B.030-13B.040.

Section 4. Evidence. (1) Formal rules of evidence shall not apply.

(2) The hearing officer shall exclude evidence that is:

- (a) Irrelevant;
- (b) Immaterial;
- (c) Unduly repetitious; or
- (d) Excludable on:
 - 1. Constitutional or statutory grounds; or
 - 2. The basis of evidentiary privilege recognized in the courts of the Commonwealth.

(3) Testimony or other evidence shall be admitted if it is:

- (a) Based on facts; and
 - (b) Commonly relied upon by reasonably prudent persons.
- (4) Hearsay evidence.

(a) Evidence shall not be excluded solely because it is hearsay.

(b) Hearsay evidence, including affidavits, may be admitted for the purpose of supplementing relevant evidence.

(5) The hearing officer may admit party or witness testimony taken by deposition if:

- (a) A party or witness is unable to attend through no fault of his own; and
- (b) The opposing party has had a full opportunity to cross-examine the party or witness.

(6) Evidence may be received in written form if it will:

- (a) Expedite the hearing; and
- (b) Not substantially prejudice the interest of a party.

(7) Copies and excerpts.

(a) A copy or an excerpt of documentary evidence may be received.

(b) Upon request, a party shall be permitted to compare the copy or excerpt with the original.

(8) Official notice shall be taken of:

(a) A fact that would be judicially noticed in the courts of the Commonwealth;

(b) The record of other proceedings before the Division of Consumer Protection;

(c) Technical or scientific matters within the specialized knowledge of the Division of Consumer Protection;

(d) Codes or standards that have been adopted by:

1. An agency of the United States, the Commonwealth, or another state; or

2. A nationally recognized organization or association, and incorporated by reference as provided by KRS Chapter 13A.

Section 5. Ex parte Communications. (1) Except as provided in this section, a hearing officer, a party, or a person with a direct or indirect interest in the outcome of a pending hearing, shall not communicate, directly or indirectly, with regard to an issue of a pending hearing with a:

(a) Party;

(b) Person who has a direct or indirect interest in the outcome of the hearing; or

(c) Person who presided at a previous stage of the hearing.

(2) Communications prohibited by the provisions of this section may be made if:

(a) Written notice is given to other parties; and

(b) Other parties are permitted to participate in the communication.

(3) A hearing officer may communicate with staff assistants, or other Division of Consumer Protection personnel, if they:

(a) Have not received ex parte communications that are prohibited to the hearing officer; and

(b) Do not furnish, augment, diminish, or modify the evidence in the record.

(4) If prior to serving as the hearing officer of a hearing, the hearing officer has received an ex parte communication that he/she is prohibited from receiving as a hearing officer, he/she shall:

(a) Place on the record of the pending hearing:

1. The written communications received;

2. The written responses to them;

3. A memorandum stating oral communications and responses; and

4. The identity of the person from whom a communication was received; and

(b) Notify and transmit copies of the items specified in subparagraph 1 of this paragraph to the parties to the hearing.

(5) Within ten (10) days of receipt of the hearing officer's notice and transmittal, a party may:

(a) Rebut the prohibited communications specified in this section; or

(b) File a motion with the Division of Consumer Protection to:

1. Disqualify the hearing officer; and

2. Seal the portions of the record pertaining to the prohibited communications.

(6) The Division of Consumer Protection shall:

(a) Report any willful violation of this section to the Attorney General or his designee for disciplinary proceedings; and

(b) Take disciplinary action authorized by statute or administrative regulation of the Division of Consumer Protection.

Section 6. Separation of Functions. (1) A person shall not serve as a hearing officer of a hearing, or assist or advise a hearing officer in a hearing, if he/she has served as an investigator, prosecutor, or advocate with regard to the subject matter of the hearing.

(2) The provisions of subsection (1) of this section shall apply to a person who is subject to the authority, direction, or discretion of persons specified in subsection (1) of this section.

(3) A person shall not serve as the hearing officer of the hearing if he/she has participated in:

- (a) A determination of the legitimacy of the business purpose of the proposed subsequent sale; or
- (b) In another equivalent preliminary determination related to the application or Division of Consumer Protection action that gave rise to a hearing.

Section 7. Procedure at Hearing. A hearing shall proceed as follows:

(1) Opening statements by the:

- (a) Counsel for applicant; and
- (b) Counsel for Division of Consumer Protection.

(2) Applicant's presentation of:

- (a) Testimony of applicant or witnesses; and
- (b) Evidence;

(3) Division of Consumer Protection's presentation of:

- (a) Witnesses; and
- (b) Evidence.

(4) Closing arguments.

(5) The hearing officer may require parties to submit legal memoranda in lieu of opening statements or closing arguments.

Section 8. Posthearing Procedure. (1) Upon completion of the hearing, within seven (7) business days after the hearing, the hearing officer shall prepare and submit to the parties;

- (a) Findings of fact and conclusions of law;
- (b) A recommended order; and

(2) A copy of the findings of fact, conclusions of law and recommended order, or decision if the Division of Consumer Protection has conducted the hearing, shall be mailed to all parties of record;

(3) Filing exceptions.

(a) A party may file exceptions to the hearing officer's findings of fact, conclusions of law and recommended order within seven (7) days of their submission to the Division of Consumer Protection.

(b) If the hearing was conducted by the Division of Consumer Protection, a party shall file exceptions with the Division of Consumer Protection.

(4) Any party to the hearing who is aggrieved by the order may seek judicial review by filing notice of appeal in the Franklin Circuit Court within thirty (30) days after the order has been mailed or delivered to him/her. (21 Ky.R. 706; Am. 1295; eff. 10-12-94.)